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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA; HOSPITAL ESPAÑOL AUXILIO MUTUO DE PUERTO RICO, INC.
Petitioners

v.

CAROLINA MORALES; EDUARDO RODRIGUEZ; CONJUGAL PARTNERSHIP RODRIGUEZ MORALES
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Congress enacted the Emergency Medical Treatment and Active I abor Act (EMTALA), (42 U.S.C. § 1395dd) in response to concerns "that hospital emergency rooms [were] refusing to accept or treat patients with emergency conditions if the patient [did] not have medical insurance." *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1189 (1st Cir 1995). The statute mandates that "all patients be treated fairly when they arrive in the emergency department of a participating hospital and that all patients who need some treatment will get first response at minimum and will not simply be turned away." *Reynolds v. Me. Gen. Health*, 218 F.3d 78, 82 (1st Cir. 2000). With this law Congress was trying to "assure that any person visiting a covered hospital's emergency room is screened for an emergency medical condition and is stabilized if such a condition exists." *Del Carmen Guadalupe v. Negron Agosto,* 299 F.3d 15, 19 (1st Cir. 2001).

One of the requirements for the application of EMTALA is that the individual must "come to" the emergency department. Id. § 1395dd (a). The question presented is:

> Whether physical presence is required by the "comes to" language contained in the statute.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

Petitioners are Sociedad Española de Auxilio Mutuo y Beneficencia and Hospital Español Auxilio Mutuo de Puerto Rico, Inc.

Respondents are Carolina Morales, Eduardo Rodriguez and the Conjugal Partnership Rodriguez Morales.

Pursuant to Rule 29.6, the appearing parties hereby inform that Hospital Español Auxilio Mutuo de Puerto Rico, Inc. is a non profit corporation registered in the Commonwealth of Puerto Rico since April 29, 1992 with registry number 22, 651-SF. Sociedad Española de Auxilio Mutuo y Beneficencia de Puerto Rico is a non profit organization founded on September 23, 1883, registered on December 14, 1912 and appears registered on the Department of State of the Commonwealth of Puerto Rico under number 303. Sociedad Española de Auxilio Mutuo y Beneficencia de Puerto Rico is the sole corporate member of Hospital Español Auxilio Mutuo de Puerto Rico, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 524 F.3d 54 and it is reproduced in the appendix. Also reproduced in the appendix are: the order denying petitioners' rehearing and rehearing en banc, and the District Court's Opinion and Order granting Petitioners' motion for summary judgment.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 2008. On May 14, 2008, the court denied petitioners' timely petition for rehearing, and the court denied petitioners' timely petition for rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C.A. §2101(c).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provision is section 1395dd (a) of the Emergency Medical Treatment and Active Labor Act (EMTALA), (42 U.S.C. § 1395dd (a)). The statutory provision provides, in its relevant part:

> *(a) Medical screening requirement*
>
> *In the case of a hospital that has a*

> *hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.*

The relevant regulatory provision is located in 42 C.F.R. §489.24(b) (4) (2003). The regulatory provision provides, in its relevant part, that an individual has come to the emergency department if :

> *(i)s in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a non hospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for*

examination and treatment. The hospital may direct the ambulance to another facility if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients. If, however, the ambulance staff disregards the hospital's diversion instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.

STATEMENT

The facts of this case, as incorporated in the Opinion rendered by the First Circuit, are quite simple: on March 12, 2004, after collapsing at her work, respondent Carolina Morales had to be taken by paramedics and rushed to petitioner Auxilio Mutuo Hospital. It was further alleged that "on the way to the hospital, paramedics contacted the emergency room personnel... and explained the situation which was interpreted as an abortion case". Finally, it was alleged that the doctor who received the call "said he was really busy and ultimately declined to receive and admit Carolina (respondent) at said medical facility". The ambulance in which respondent Morales was transported during the incident was not property of petitioners. Furthermore, the paramedics who provided services to Morales during the incident were not employees of petitioners.

Following discovery, petitioners moved for summary judgment on the EMTALA count, arguing

that the statute did not apply because respondent had never come to its emergency department. The district court granted the motion and simultaneously dismissed the supplemental local law claims without prejudice. After unsuccessfully moving for reconsideration, respondents filed an appeal.

On April 18, 2008 the United States Court of Appeals for the First Circuit issued a split decision in which it concluded that petitioners were not entitled to summary judgment because "(p)resented with an imprecise statute, an unenlightening regulation, and an absence of any clear agency interpretation of what that regulation means, we must rely on the manifest purpose of the statute to interpret the critical statutory phrase. On that basis, and taking the facts and the reasonable inferences there from in the light must hospitable to plaintiff, we hold that a reasonable fact finder could conclude that the plaintiff had come to the Hospital's emergency department within the purview of EMTALA".

In reaching its conclusion, the majority of the Court of Appeals panel not only ignored the plain language of EMTALA, but ruled in complete contradiction of the Secretary of Health and Human Services (HHS) interpretation of its own regulation. Both actions, as we will discuss, had the irremediable effect of altering one of the principal and basic aspects of EMTALA.

REASONS FOR GRANTING THE PETITION

This case merits review by this Court to correct fundamental legal errors by the Court of Appeals that not only departs from settled law principles, but also dramatically alter Congress's intentions in the creation of EMTALA.

Review of these errors is urgently needed because the ruling below could seriously affect the healthcare industry.

The Court of Appeals' reversal of the District Court's decision also warrants review to ensure uniformity of an issue of national importance.

I. THE COURT OF APPEALS LEAD OPINION DEPARTS FROM THE PLAIN LANGUAGE OF EMTALA AND FROM THE HHS REGULATION

In the Court of Appeals' dissenting opinion, Judge Torruella states that "to me is clear that comes to an emergency department unambiguously means arrives at an emergency department." After a thorough reading of EMTALA, including the congressional purpose behind the statute, we must coincide with Judge Torruella.

The United States Congress enacted the *Emergency Medical Treatment and active Labor Act (EMTALA), (42 U.S.C.A. § 1395dd)* in response to concerns "that hospital emergency rooms [were]

refusing to accept or treat patients with emergency conditions if the patient [did] not have medical insurance." *Correa v. Hosp. San Francisco,* 69 F.3d 1184, 1189 (1st Cir 1995). The statute mandates that "all patients be treated fairly when they *ARRIVE* in the emergency department of a participating hospital and that all patients who need some treatment will get first response at minimum and will not simply be turned away." *Reynolds v. Me. Gen. Health*, 218 F.3d 78, 82 (1st Cir. 2000). With this law Congress was trying to "assure that any person *VISITING* a covered hospital's emergency room is screened for an emergency medical condition and is stabilized if such a condition exists." *Del Carmen Guadalupe v. Negron Agosto,* 299 F.3d 15, 19 (1st Cir. 2001).

A plaintiff bringing a private cause of action under EMTALA must show that (1) the defendant hospital is a participating hospital; (2) *THE PATIENT ARRIVED AT THE HOSPITAL'S FACILITY SEEKING TREATMENT;* and (3) the hospital either (a) failed to afford the patient a proper screening or (b) discharged or transferred the patient without first stabilizing her emergency condition. *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1190 (1st Cir. 1995); *Malavé Sastre v. Hospital Doctor's Center, Inc.*, 93 F. Supp. 2d 105, 109 (D.P.R. 2000), *Medero Díaz v. Grupo De Empresas De Salud*, 112 F. Supp.2d 222, 225 (2000).

As with any question of statutory interpretation, the text of the statute should be examined to determine whether its meaning is clear. See *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432, 438, (1999). "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (quoting *Merritt v. Dillard Paper Co.*, 120 F. 3d 1181, 1185 (11th Cir. 1997). We do this because we "presume that Congress said what it meant and meant what it said. " *United States v. Steele*, 147 F.3d at 1318.

In *United States v. Charles George Trucking Co.*, 823 F. 2d 685 (1st Cir. 1987), the Court of Appeals for the First Circuit established that "where, as here, that language points unerringly in a single direction, and produces an entirely plausible result, it is unnecessary-and improper-to look for other signposts or to browse in the congressional archives. *United States v. Meyer,* 808 F.2d 912, 915 (1st Cir.1987). Such use of the legislative history would ... be contrary to the well-established rule that a court 'will resort to the legislative history and other aids of statutory construction only when the literal words of the statute create ambiguity or lead to an unreasonable interpretation." *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corporation,* 545 F.2d 754, 757 (1st Cir.1976) (quoting *Araya v. McLelland,* 525 F.2d 1194, 1195-96 (5th Cir.1976)). So long as the statutory language is reasonably definite, that language must ordinarily be regarded as conclusive (at least in the absence of an unmistakable legislative intent to the contrary). *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110, 103 S.Ct. 986, 990, 74 L.Ed.2d 845 (1983);

United States v. Turkette, 452 U.S. at 580, 101 S.Ct. at 2527; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

In the case before us, the statutory command is clear. The language used by Congress was plain and simple: "if any individual... *COMES TO* the emergency department (of a covered hospital) and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination." 42 USC Sec. 395dd(a).

The Court of Appeals lead opinion concludes that the phrase "comes to" admits more than one meaning. Although we disagree with such statement, a reading of the statute as a whole, and the Congressional purpose and intent behind it, clarifies any doubt that may exist. As stated by Judge Torruella in his dissenting opinion: "the statute seeks to combat some instances of patient dumping that occurs after an "undesirable" patient shows up at the emergency room doors. While this restriction to physical presence may not have been the wisest one for Congress to write into the statute, it is not our prerogative to substitute our will for that of Congress." (Citations omitted).

The Court of Appeals majority decision is even in open contradiction with previous cases dealing with EMTALA. As stated before, in *Correa, Malave* and *Medero* the First Circuit indicated that one of the basic

requirements of an action based on EMTALA is that the patient must *ARRIVE* at the facility. If the Circuit Court, after a thorough analysis, concluded in those cases that the phrase "comes to" equals "arrive" we must conclude that in this particular case respondent did not "come to" the hospital because she did not "arrive" at the facility.

Even if the Court of Appeals decided against the plain language of the statute, and against its own previous interpretation of that language, faced with an alleged "ambiguous meaning" the court should "search for clarification in the agency's interpretation of its own regulation".

In *Chevron, U.S.A., Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837 (1984), this court stated that when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The court need

not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S., at 39, 102 S.Ct., *at 46; Zenith Radio Corp. v. United States,* 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2*d* 337 (1978); *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 75, 95 S.Ct. 1470, 1479, 43 L.Ed.2d 731 (*1975); Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)*; Unemployment Compensation Comm'n v. Aragon,* 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946)*; McLaren v. Fleischer,* 256 U.S. 477, 480-481, 41 S.Ct. 577, 577-578, 65 L.Ed. 1052 (1921).

The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its

own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *United States v. Morton*, 467 U.S. 822, 834, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680 (1984); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-426, 97 S.Ct. 2399, 2404-2406, 53 L.Ed.2d 448 (1977); *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 235-237, 57 S.Ct. 170, 172-173, 81 L.Ed. 142 (1936). *INS v. Jong Ha Wang*, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S., at 87, 95 S.Ct., at 1485.

This Supreme Court has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479-2480, 81 L.Ed.2d 301 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); *Union Electric Co. v. EPA*, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S., at 153-154, 67 S.Ct., at 250-251; *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); *McLaren v. Fleischer*, 256 U.S., at 480-481, 41 S.Ct., at 577-578;

Webster v. Luther, 163 U.S., at 342, 16 S.Ct., at 967; *Brown v. United States*, 113 U.S. 568, 570-571, 5 S.Ct. 648, 649-650, 28 L.Ed. 1079 (1885); *United States v. Moore*, 95 U.S. 760, 763, 24 L.Ed. 588 (1878); *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210, 6 L.Ed. 603 (1827).

It has been consistently followed that whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. *National Broadcasting Co. v. United States*, 319 U.S. 190; "... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer, 367 US 374, 382, 383, 81 S. Ct. 1554, 1560, 1561, 6L. Ed. 2d 908 (1961).*

The Centers for Medicare and Medicaid Services ("CMS"), a sub-agency within HHS responsible for overseeing federal Medicare and Medicaid programs, issued in 2003 regulations in the Federal Register under EMTALA. *Federal Register, Vol. 68, No. 174.* The purpose of HHS' rules and guidelines was to address misunderstanding over what EMTALA required and the provider's view that the regulations had expanded the law beyond the original intent of the

statute. Widespread inconsistent enforcement of the law existed across state and CMS' regions, and conflicting court opinions, such as *Miller v. Med. Ctr. of Sw. La.*, 22 F.3d 626 (5th Cir 1994); *Johnson v. University of Chicago Hospitals*, 982 F.2d 230 (7th Cir 1992) and *Arrington v. Wong*, 237 F.3d 1066 (9th Cir 2001), further exacerbated those misunderstandings.

In its regulations, HHS established that a person "comes to" the emergency department for purposes of EMTALA if the individual is in a ground or air ambulance owned and operated by the hospital for purposes of examination and treatment for a medical condition at a hospital's dedicated emergency department, even if the ambulance is not on hospital grounds. But, if a non hospital owned ambulance is off hospital property, *then the patient has not come to the emergency department, even if a staff member from the ambulance contacts the hospital via telephone or telemetry and informs the hospital that the patient is being transported to the emergency department. A non hospital owned ambulance has "come to the hospital's ED" for purposes of triggering EMTALA once it reaches hospital property, even if the medics ignore the hospital's diversionary status or a physician's direct order to divert.*

Face with such clear language, the regulation clearly requires physical presence in the facility in a scenario virtually identical to this case, the Court of Appeals' majority decision chose to discard it by describing the language in the regulation as

"elliptical". In doing so, and without any further explanation whatsoever, the majority decision took its own route in defining what "comes to" means within the context of EMTALA.

It is evident that the Court of Appeals ignored the clear language of EMTALA and ruled against the agency's interpretation of its own regulation. Based on those two facts, the petition for a writ of certiorari should be granted.

II. THE COURT OF APPEALS LEAD OPINION IS IN CONFLICT WITH PREVIOUS DECISIONS OF OTHER UNITED STATES COURT OF APPEALS

As previously mentioned, the Court of Appeals ruling follow a series of contradictory decisions of other circuits regarding the same issue.

In both, *Johnson v. University of Chicago Hospitals,* 982 F.2d 230 (7th Cir. 1992) and *Miller v. Medical Center of Southwest Louisiana*, 22 F.3d 626 (5th Cir. 1994), the Fifth and Seventh Circuits concluded that physical presence is required in order to trigger EMTALA liability.

In *Johnson v. University of Chicago Hospitals*, a mother sued a hospital which operated a telemetry system, directing paramedics transporting patients to the appropriate hospital in the system. The paramedics were instructed to take the daughter to a

different, more distant hospital where she subsequently died. The Seventh Circuit upheld the dismissal of the EMTALA claim because of its conclusion that, under the plain meaning of the statute, the child never "came to" the hospital or its emergency department.

Likewise in *Miller v. Medical Center of Southwest Louisiana* the Fifth Circuit held that physical presence was required. In Miller the court found that the patient never physically came to the emergency department. "There was only a request over a telephone. Nevertheless, the Plaintiffs argue that we should not construe this statute to require physical presence at the emergency room. Instead, the Plaintiffs contend that Congress intended that the statute would extend the hospital's duty to any individual in need of emergency care who requests treatment at the hospital's emergency department. In essence, the Plaintiffs are asking this Court to excise the "comes to" clause out of the statute by construing it as to make it redundant with the "request is made" clause. We reject this argument..." Id. The court cited two reasons for rejecting Plaintiffs argument. First, the language of the statute unambiguously describes the individuals covered by section 1395dd as those who come to the emergency department. Id. Second, such an interpretation would render the "comes to" clause a nullity.

On the other hand, on January 22, 2001, a Federal appellate panel in the Ninth Circuit concluded that EMTALA extended not only to patients who

physically arrive at a hospital, but also to patients who are en route to the hospital in an ambulance that is neither owned nor controlled by the hospital. *Arrington v. Wong*, 237 F.3d 1066 (9th Cir. 2001). Prior to the First Circuit decision in this case, the Ninth Circuit decision was the first and only court decision to apply the anti dumping statute to a patient who is not physically present at a hospital.

In *Arrington*, a patient in respiratory distress was picked up and in transit to the nearest hospital, Queens Medical Center, in an ambulance that the hospital neither owned nor controlled. En route to the hospital, ambulance personnel relayed to the hospital emergency department that the patient was in severe respiratory distress. The emergency department physician requested the identity of the patient's physician. The ambulance personnel responded that the patient's physician practiced at the more distant Army Medical facility. The emergency department physician indicated that he thought the patient should be taken to the Army facility. The patient arrived at Army Medical Center shortly thereafter. By that time, however, the patient's condition had deteriorated, and he died thirty seven minutes later.

The deceased patient's estate sued the Queens hospital, among others, for damages, alleging a violation of EMTALA. Before trial, the district court dismissed the complaint, concluding that the hospital did not violate the antidumping statute because that patient had never "come to" the hospital,

Arrington v. Wong, 19 F. Supp. 2d 1151 (D. Haw. 1998). The district court relied on the two prior decisions of the Fifth and Seventh Circuit court of appeals in reaching
this decision.

A three-judge panel of the Ninth Circuit reversed the district court's decision by a two-to-one vote. The majority opinion concluded, first, that the meaning of the statutory term "comes to" is ambiguous. The majority of the panel was persuaded that the phrase could mean "either physical arrival at the emergency room or the act of traveling from the scene of an emergency to or towards the hospital."

Having determined that the statutory text is ambiguous, the court then looked to the HHS' regulations for guidance as to the agency's construction of the statute. The court concluded that Medicare regulations at title 42, CFR section 489.24(b), permissibly construe EMTALA to apply to any patient who is traveling to a hospital emergency department in an ambulance, unless the ambulance is not owned or controlled by the hospital and the hospital is on "diversionary status" (i.e., it lacks the staff or facilities to receive additional emergency patients).

The First Circuit majority decision in this case follows the *ratio decidendi* of the Ninth Circuit in *Arrington* even though it is inconsistent with the plain language of EMTALA, the agency's interpretation of its own regulation, and the Fifth and Seventh Circuits

ruling on the exact same issue. If this Court declines to resolve the issue presented now, we will continue to see inconsistent readings and applications of an issue that was very specifically addressed by Congress in the statute's language. These inconsistencies are drawn out of an important question of federal law that should be settled by this Court.

Thus, there are critically important reasons not only for this Court to resolve the questions presented, but also to reach them in the current case.

Finally, without waiving our previous arguments and in the alternative, due to the fact that the Court of Appeals "determine(d) for the first time what it means to "come to" a hospital's emergency department within the purview of EMTALA" we respectfully request that the new interpretation, if sustained, be applied prospectively. That ruling would be consistent with the fact that Petitioners were not aware of the Court's interpretation at the time the events took place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 7, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-1951

CAROLINA MORALES, et al.,

Plaintiffs, Appellants

v.

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA, et al.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, U.S. District Judge]

Before

Boudin, Chief Judge,
Torruella, Circuit Judge,
and Selya, Senior Circuit Judge.

Pedro F. Soler-Muñiz for appellants.

Juan A. Pedrero Lozada, with whom Arroyo, Monrouzeau, PSC, was on brief, for appellees.

April 18, 2008

SELYA, Senior Circuit Judge. This appeal requires us to determine for the first time what it means to "come[ ] to" a hospital's emergency department within the purview of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. After carefully considering the language of EMTALA, the regulation addressing the pertinent statutory text, and the policies that underlie the statute, we hold that an individual can come to the emergency department for EMTALA purposes without physically arriving on the hospital's grounds as long as the individual is en route to the hospital and the emergency department has been notified of her imminent arrival. We therefore reverse the order terminating the action and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Because this case was resolved on summary judgment, we take the facts in the light most favorable to the nonmovant (here, plaintiff-appellant

Carolina Morales)[1], consistent with record support. See Garside v. Osco Drug, Inc, 895 F.2d 46, 48 (1st Cir. 1990).

On March 10, 2004, the plaintiff's obstetrician diagnosed her as having a nonviable ectopic pregnancy. While at work two days later, the plaintiff experienced severe abdominal pain accompanied by vomiting. Her co-workers called an ambulance. After placing the plaintiff inside, the crew of the ambulance set off for Hospital Español Auxilio Mutuo de Puerto Rico (the Hospital), an institution at which her obstetrician regularly practiced. The ambulance was not owned by the Hospital and the paramedics who manned it were not Hospital employees.

While in transit to the Hospital, the paramedics called ahead to the emergency department and notified the director, Dr. Salvador Marquez, of the plaintiff's condition, forthcoming arrival, and need for treatment. In the first of two conversations with the paramedics, Dr. Marquez seemed worried that the plaintiff might voluntarily have induced an abortion. He also stated that he was very busy and asked the paramedics to call back when they had more information about the suspected abortion.

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[1] Morales's husband and their conjugal partnership are co-plaintiffs and co-appellants, but their claims are wholly derivative. For ease in exposition, we refer throughout to Moralesas if she were the sole plaintiff and appellant.

When the paramedics telephoned again, Dr. Marquez inquired as to whether the plaintiff had medical coverage or was a member of the Hospital's insurance program. Receiving no such assurances, he abruptly terminated the call (an action that the paramedics interpreted as a refusal to treat the plaintiff at the Hospital's emergency department). Dr. Marquez at no time claimed that the Hospital was in diversionary status.[2]

Stymied by Dr. Marquez's actions, the paramedics took the plaintiff to a different facility. She was treated there.

In due season, the plaintiff brought suit against the Hospital and others for violating EMTALA and for sundry torts under local law.[3] Following discovery, the Hospital moved for summary judgment on the EMTALA count, arguing that the statute did not apply because the plaintiff had never come to its emergency department. The district court, granted the motion and simultaneously dismissed the supplemental local-law claims without prejudice. See Morales v. Sociedad Española de Auxilio Mutuo y Beneficencia,

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[2] A hospital is in diversionary status if it does not at the time "have the staff or facilities to accept any additional emergency patients." 42 C.F.R. § 489.24 (b) (4).

[3] For present purposes, we need neither catalogue the identity of the other defendants nor trace their relationship to the Hospital.

Civ. No. 06-1039, slip op. at 9 (D.P.R. Apr. 26, 2007) (unpublished). After unsuccessfully moving for reconsideration, the plaintiff prosecuted this timely appeal.

II. ANALYSIS

We review a grant of summary judgment de novo. Houlton Citizens' Coal. v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999). The starting point is to canvass the evidence in the light most flattering to the nonmovant, drawing all reasonable inferences in that party's favor. Id. If the record, so viewed, discloses no genuine issue as to any material fact and shows conclusively that the movant is entitled to judgment as a matter of law, we must affirm the judgment. See Fed. R. Civ. P. 56(c).

In this instance, a number of relevant facts are undisputed. The parties agree, for example, that the Hospital is covered under EMTALA and that it operates an emergency room. Moreover, for summary judgment purposes we can accept as givens that the paramedics opted to take the plaintiff to the Hospital; that they contacted the Hospital's emergency department while en route and made this intention known; and that they requested the Hospital to admit the plaintiff for a screening examination in order to assess (and if necessary stabilize and treat) her condition. We also can accept as true for summary judgment purposes the reasonable (though not inevitable) inference that the

Hospital, after learning about the plaintiff's uninsured status, signaled the paramedics to transport her elsewhere. The question, then, is whether the plaintiff had come to the Hospital's emergency department for EMTALA purposes at the time she was rebuffed.

The plaintiff argues that once the ambulance crew decided to take her to the Hospital, set out in that direction, and contacted the director of the emergency department to facilitate her reception, she had for all practical purposes "come[ ] to" the Hospital. The Hospital demurs; it argues that EMTALA is not triggered until a prospective patient physically passes through the hospital's gates and arrives on its premises. It is, thus, readily apparent that this appeal turns on a singular and quintessentially legal question: whether, on the plaintiff's version of the facts, a reasonable jury could find that she had come to the Hospital's emergency department as required under EMTALA. To answer this question, we must parse that statute and the regulations thereunder, and then apply the distilled legal rules to the facts.

We begin, of course, with the language of the statute itself. See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); United States v. Nason, 269 F.3d 10, 15 (1st Cir. 2001). If, after employing all the traditional tools of construction, the statute's text seems unambiguous and the ordinary meaning of that unambiguous language yields a reasonable

result, the interpretive odyssey is at an end. See Robinson, 519 U.S. at 340-41; Nason, 269 F. 3d at 16. If, however, the language admits of a possible ambiguity and Congress has not spoken directly to the issue, the court must look for guidance to any relevant regulations promulgated by an agency charged with administering the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Muñiz v. Sabol, 517 F. 3d 29, 38 (1st Cir. 2008).

In those circumstances, a court is bound to apply the agency's interpretation of the statute, as embodied in a regulation, as long as it constitutes a permissible construction of the statutory text. Chevron, 467 U.S. at 843. Determining a regulation's meaning requires application of the same principles that imbue exercises in statutory construction. See, e.g., Cumberland Coal Res., LP v. Fed. Mine Safety & Health Rev. Comm'r, 515 F.3d 247, 254 (3d Cir. 2008); Sidell v. Comm'r, 225 F.3d 103, 110 (1st Cir. 2000).

When the regulatory language remains ambiguous even after the application of those principles, an inquiring court must look beyond the letter of the regulation and defer to an agency's reasonable interpretation of the regulation. United States v. Lachman, 387 F.3d 42, 54 (1st Cir. 2004); See Christensen v. Harris County, 529 U.S. 576, 588 (2000). If, however, even that effort fails to clarify the uncertainty, the court has no choice but to step

into the breach and resolve the ambiguity in the manner most consistent with Congress's discernible intent. See Chevron, 467 U.S. at 843.

With this framework in place, we turn to the particulars of the statutory language at issue here. Congress enacted EMTALA in response to widespread reports that hospitals were refusing either to admit or to provide emergency treatment to indigent persons. See Correa v. Hosp. San Francisco, 69 F. 3d 1184, 1189 (1st Cir. 1995). In order to ensure that individuals of every socioeconomic class would be treated fairly when undergoing medical emergencies regardless of their insurance status or ability to pay, Congress crafted the statute to prohibit the "dumping" of financially undesirable patients. See Reynolds v. MaineGen. Health, 218 F.3d 78, 83 (1st Cir. 2000) (discussing legislative intent).

EMTALA covers most hospitals; its reach extends to any hospital that participates in the federal Medicare program. See 42 U.S.C. § 1395dd (e) (2). The statutory scheme imposes a variety of obligations on covered institutions. First, "if any individual ...comes to the emergency department [of a covered hospital] and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination." Id. § 1395dd (a). Second, if the screening examination discloses that the individual suffers from an

emergency medical condition, the hospital must provide necessary stabilization. See id. § 1395dd (b)(1). As can be gleaned from our earlier account of the facts, this case implicates only the first of these two requirements.

That first requirement itself has two parts: the individual must (i) "come [ ] to" the emergency department and (ii) be the subject of a request "for examination or treatment." Id.§ 1395dd(a). Here, however, there is plainly evidence of a request for treatment (this would be an entirely different case if the paramedics, while en route, had failed to contact the emergency department in order to pave the way for medical assistance for their charge). Thus, we focus exclusively on the "comes to" component of the first requirement.

The statute does not define the phrase "comes to the emergency department." Nor is the phrase self-elucidating: it has more than one meaning in common parlance. See, e.g., Webster's Third New International Dictionary 453 (1993) (defining "come" to mean variously either to move toward or approach, or to arrive at, among other definitions). Consequently, a plain meaning approach to construing this phrase does not offer a solution to the problem that confronts us. And the legislative history - beyond its emphasis on the evil to be combated: patient dumping -is not fully illuminating. We therefore turn to the regulations.

Congress charged the Secretary of Health and Human Cervices (HHS) with administering EMTALA's provisions. 42 U.S.C. § 1395hh (a) (1). HHS first promulgated the contemplated regulations in 1994. See 59 Fed. Reg. 32,086, 32,120-21 (June 22, 1994). An amended version, promulgated in 2003, was in effect at the time of the events at issue here. See 68 Fed. Reg. 53,222, 53,262-63 (Sept. 9, 2003).

In the regulations, HHS elected to define the key phrase - "comes to the emergency department" - in a rather elliptical manner. The pertinent provision states that an individual has come to the emergency department if she

> [i]s in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment. The hospital may direct the ambulance to another facility

> if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients. If, however, the ambulance staff disregards the hospital's diversion instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.42 C.F.R. § 489.24 (b) (4) (2003).

The only federal appellate court to have construed this provision in order to help determine the meaning of the phrase "comes to the emergency department" is the Ninth Circuit. See Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001). In that factually similar case, an individual was en route to the hospital in a non-hospital-owned ambulance when the paramedics contacted the hospital's emergency department to pave the way for the prospective patient's screening. Id. at 1069. The hospital, which was not in diversionary status, redirected the ambulance elsewhere. Id. at 1073.

Construing 42 C.F.R. § 489.24 (2000), an earlier but materially identical version of the current regulation, the court concluded that an individual in an ambulance that is en route to a hospital can qualify as an individual who has come to the hospital for EMTALA purposes. Id. at 1072. Therefore, the hospital may not turn away such an individual and deny his request for treatment unless it is in

diversionary status.[4] Id. at 1073 (stating that the "plain language of the agency's rules" requires that outcome).

Here, the district court rejected the reasoning of the Arrington majority and concluded that the plaintiff had never come to the Hospital's emergency department within the meaning of EMTALA. Morales, supra, slip op. at 9. In reaching this conclusion, the court appropriately determined that Congress had not made clear the meaning of the phrase "comes to the emergency department. "Accordingly, the court sensibly looked to the regulation for guidance. In that exercise, it focused in isolation on the second sentence of 42 C.F.R. § 489.24(b)(4). See id. at 8 (stating that "while the [second sentence] is helpful in interpreting the meaning of the phrase 'comes to the emergency department' within the context of EMTALA, the [third sentence] adds nothing to that interpretation").

In our view, the court's analysis of the regulation was flawed. To determine the regulation's

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[4] A dissenting judge took the position that requiring less than actual physical arrival reads the "comes to" requirement out of the statute. Arrington, 237 F.3d at 1075 (Fernandez, J., dissenting). He opined that the regulation "adds an ambiguity," but read its purportedly unclear language to mean that diversionary status is merely one example of an instance in which a hospital may redirect an ambulance. Id. at 1076.

meaning, an inquiring court first should apply the same set of principles that inform statutory construction. A well-established canon of construction requires that courts give all language in a statute operative effect. See Duncan v. Walker, 533 U.S. 167, 174 (2001); Aguilar v. U.S. Immig. & Customs Enf., 510 F.3d 1, 10 (1st Cir. 2007); United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985).

This canon is fully transferable to the construction of regulations. Thus, a court should interpret a regulation so that, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan, 533 U.S. at 174). The district court's observation that the sentence addressing diversionary status "adds nothing" to the meaning of the regulation, Morales, supra, slip op. at 8, flies in the teeth of this tenet.

The canons of construction counsel, therefore, that we explore the feasibility of an interpretation that reads the provision to give meaning to all four of its sentences. Although we can speculate about different ways to reconcile the seemingly inconsistent sentences and can postulate various iterations, all of these readings seem forced. Simply put, without some language qualifying the relationship between the second and third sentences, it is unclear whether a hospital may divert an approaching ambulance only when it is in

diversionary status, or whether it may do so under other circumstances.

Regulatory construction-like statutory construction -is not an exact science, and there are times when contortionistic strivings at seamless interpretation must yield to common sense. This is such a time: the regulation is a hodge-podge and, despite assiduous interpretive efforts, its overall meaning remains obscure.

In some cases, regulatory history or exogenous agency statements may help to resolve such a dilemma. Cf. United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999) (stating courts may look to legislative history when statutory text is ambiguous). Here, however, those sources at most reveal that 42 C.F.R. § 489.24 (b) (4) was promulgated in a way designed to be consistent with the decision in Johnson v. University of Chicago Hospitals, 982 F.2d 230 (7th Cir. 1992). There, the Seventh Circuit held that a telemetry system had permissibly redirected an off-property individual when the particular hospital was in a status similar to diversionary status. See 59 Fed. Reg. at 32,098. That is not particularly illuminating here.

In the face of such ambiguity, we search for clarification in the agency's interpretation of its own regulation. The Hospital made a frontal attack on this ground during oral argument, asserting that

language in interpretive guidelines issued by the Centers for Medicare and Medicaid Services (CMS) compels us to hold that any individual in a non-hospital-owned ambulance who is off-property has not come to the emergency department.[5] See CMS, State Operations Manual app. V, at 32 (2004) ("If an individual is not on hospital property . . . th[e] regulation is not applicable."). But we find little in the way of guidance there. The quoted statement begins a paragraph in which CMS reiterates the basic components of the regulatory provision previously addressed and does nothing to ease the degree of obscurity found in the regulation itself. See id. (stating, in part, that " [i]f an individual is in an ambulance, regardless of whether the ambulance is owned by the hospital, a hospital may divert individuals when it is in 'diversionary' status"). Thus, the statement furnishes no real guidance as to the question before us. Similarly, HHS's explanations of the regulation elsewhere in the Federal Register do not yield a clear answer about how the provision as a whole is meant to operate. See, e.g., 59 Fed. Reg. at 32,098; 68 Fed. Reg. at 53,227-34.

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[5] CMS, formerly known as the Health Care Financing Administration, is a sub-agency within HHS. Its responsibilities include overseeing federal Medicare and Medicaid programs.

The short of it is that we are left to wonder whether, if an individual in a non-hospital-owned ambulance has not yet reached hospital property, a hospital may redirect the individual for virtually any reason (including the individual's impecuniousness).

Given the imprecision of the statute and the regulation and the absence of reliable guidance from the agency, we think it is appropriate to resolve the ambiguous "comes to" language in accordance with statutory intent. First and foremost, that intent dictates that the statute and its implementing regulations must be interpreted in a way that prevents hospitals from "dumping" patients.

An interpretation of the statute concluding that an individual en route to the hospital, under the plaintiff's version of the facts, has "come [ ] to" the emergency department fits most squarely with this intent. This reading comports with EMTALA's primary goal and hinders efforts to turn away prospective patients because of their economic status. In that way, it enhances the ability of indigent individuals to receive timely first-response care.

This reading therefore avoids the perverse incentives created under the district court's contrary interpretation. That interpretation encourages easy evasion of the statutory mandate and opens a gaping hole in the fabric of the remedial scheme. If a hospital were allowed to turn away an individual

while she was en route to the hospital under these facts, an uninsured or financially strapped person could be bounced around like a ping-pong ball in search of a willing provider. That result would be antithetic to the core policy on which EMTALA is based.

This sensible construction also preserves the practice of ambulances contacting hospitals prior to arrival when perceived emergencies exist. That practice is salutary because it enables emergency rooms to undertake suitable preparatory measures. Yet, if the crew of an ambulance fears refusal because of, say, the absence of medical insurance, the crew may well decide to approach under cover of silence. Upon arrival, the emergency room would be required to examine and/or treat the individual, but precious time would have been lost.

The Hospital, ably represented, mounts a counterargument. It laments that our holding - that an individual needing emergency treatment who is en route to the hospital can in certain circumstances be said to have come to the emergency department – is at odds with the decisions of some of our sister circuits. This lamentation is premised on two cases, neither of which is on point.

In the first of these cases, a doctor at one hospital telephoned a second hospital to request emergency care for the plaintiff. Miller v. Med. Ctr. of Sw. La., 22 F.3d 626, 627 (5th Cir. 1994). The

second hospital declined after determining that the plaintiff had no insurance coverage. Id. The court rejected an EMTALA claim against the second hospital on the ground that the plaintiff, at the time of the treatment request, was an in-patient at the first hospital and, thus, could not in any sense be said to have come to the second hospital. Id. at 629; see also id. at 629 n.5 (noting that the plaintiff "never even began the journey" to the second hospital). That is a far cry from the case at bar.

The other case hawked by the Hospital is Johnson. There, an ambulance contacted a hospital's telemetry system, which redirected it to a different facility. 982 F.2d at 231. The Seventh Circuit rejected a claim that the hospital had violated EMTALA because the ambulance's contact was with the hospital's telemetry system, not with its emergency department. Id. at 233 & n.7. At any rate, the hospital at the time was in "partial bypass" status (an analogue to diversionary status). Id. at 231. These facts distinguish Johnson from the case at bar.

Last - but surely not least - we reject any suggestion that our holding today is inconsistent with prior decisions of this court. None of our earlier cases dealt with any fact pattern remotely resembling the scenario that is alleged here. See, e.g., Del Carmen Guadalupe v. Negrón Agosto, 299 F. 3d 15, 17-18 (1st Cir. 2002); Reynolds, 218 F.3d at 79-80; Correa, 69 F.3d at 1188-89. While those

opinions recognize the presence of the "comes to" language in the statute and acknowledge that this requirement must be satisfied in order to bring EMTALA into play, they stop there; none of them attempt to define that terminology, to delineate its boundaries, or to decipher the significance of the implementing regulations.

At this point, a succinct summary suffices. Presented with an imprecise statute, an unenlightening regulation, and an absence of any clear agency interpretation of what that regulation means, we must rely on the manifest purpose of the statute to interpret the critical statutory phrase. On that basis, and taking the facts and the reasonable inferences therefrom in the light most hospitable to the plaintiff, we hold that a reasonable factfinder could conclude that the plaintiff had come to the Hospital's emergency department within the purview of EMTALA; that a request for examination or treatment had been tendered on her behalf; and that the request had been rebuffed because of her uninsured status.[6] Consequently, the case is not an appropriate candidate for summary judgment.

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[6] We limit our holding to cases that fairly can be characterized as involving patient "dumping." We take no view as to whether or when a hospital emergency department may have a right to redirect prospective patients for other reasons.

III. CONCLUSION

In conclusion, we add a coda. As matters stand, this is a close and difficult case. Because the statutory phrase admits of different constructions, the agency has the authority, should it choose to act, to resolve the ambiguity either way. To this date, however, HHS has not done so. Unless and until that occurs, we must do the best we can with the interpretive aids that are available.

We need go no further. We reverse the judgment appealed from and remand for further proceedings consistent with this opinion (including reinstatement of the plaintiff's local-law claims).

Reversed and remanded.

- Dissenting Opinion Follows -

TORRUELLA, Circuit Judge (Dissenting). "It is only where the sound of the legislative trumpet is muted or uncertain that judges must interpret -- and in interpreting, create. But where the call is a clarion one, the courts have no warrant to rewrite a statute in the guise of 'interpretation.'" United States v. Charles George Trucking Co., 823 F.2d 685, 689 (1st Cir. 1987). This is precisely what the majority has done in this case.

While the majority aptly sets forth the correct framework for interpreting a statute, it errs in

proceeding beyond the first step -- examination of the statutory text itself. It is axiomatic that where the text of a statute is unambiguous, and the ordinary meaning it reveals is not unreasonable, implausible, absurd, or inconsistent with the statutory scheme, then we should give effect to this meaning. See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous.") ; Mullane v. Chambers, 333 F.3d 322, 330 (1st Cir. 2003); see also Pritzker v. Yari,, 42 F.3d 53, 67-68 (1st Cir. 1994) ("[W]e will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity or some other extraordinary consideration, such as the prospect of yielding a patently absurd result...") (internal citations omitted).

The relevant statutory text reads:

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . .

42 U.S.C. 1395dd(a) (emphasis added). In an apparent attempt to free itself from this textual straitjacket, the majority follows the lead of the Ninth Circuit in Arrington v. Wong, 237 F.3d 1066 (9th Cir, 2001), in positing a dubious ambiguity through resort to Webster's dictionary. See id. at 1070-71. While I have no quarrel with Webster's affirmation that "to come," in the abstract, can admit of two meanings -- to move toward or approach, or to arrive at -- we cannot look at this definition in the abstract. Instead, we must read the verb "to come" in the context of the sentence in which it appears, and we cannot simply ignore the verb conjugation chosen by Congress. See Robinson, 519 U.S. at 341. The statute speaks of an individual who "comes to the emergency department." The common and ordinary reading of "comes to the emergency department" is "arrives at the emergency department, not "moves toward or approaches the emergency department. See Williams v. Taylor, 529 U.S. 420, 431 (2000) ("We give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.") (internal quotation marks and citation omitted). To produce the latter connotation, the statute would have to say "is coming to," "comes toward," or some similar construction entailing ongoing action or movement. See Arrington, 237 F.3d at 1075 n.2 (Fernández, J., dissenting) ("For example, if we say that someone has 'come home,' we mean that he has arrived. We do not mean that he is on the way; to express that, we would say that he is

'coming home.'"). The majority contorts the plain meaning of "comes to" by interpreting it as potentially meaning "moves toward or approaches" in this particular sentence, thereby manufacturing an ambiguity that otherwise would not exist.

To me it is clear that "comes to an emergency department" unambiguously means arrives at an emergency department.[7] This interpretation, while unfortunate for Morales and others in her position, is neither unreasonable nor implausible. It is also not inconsistent with the statutory scheme or the broader context of the statute as a whole: the statute seeks to combat some instances of patient dumping, including dumping that occurs after an "undesirable" patient shows up at the emergency room doors. While this restriction to physical presence may not have been the wisest one for Congress to write into the statute, it is not our prerogative to substitute our will for that of Congress. As such, our inquiry ends there. Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 254 (2000); United States v. Roberson, 459 F.3d 39, 51 (1st Cir. 2006); See also In re Cavanaugh, 306 F.3d 726, 731-32 (9th Cir. 2002) ("Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals."). The majority ran

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[7] I state no view on whether "emergency department" in the statute includes the grounds of the hospital generally because this question is not at issue in this appeal.

afoul of this principle in continuing along on its interpretive odyssey far longer than it should have.

Even if we succumb to the siren's song and join the majority in its scrutiny of the regulation – an exercise I deem unwarranted -- the end result is the same. The regulation provides:

> Comes to the emergency department means . . . the individual. . [i]s in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment. The hospital may direct the ambulance to another facility if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients. If, however, the ambulance staff disregards the hospital's diversion instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.

42 C.F.R. § 489.24 (b) (4) (emphasis added). The meaning of the first and second sentences becomes evident simply by reading them: an individual in a non-hospital-owned ambulance has not "come to" the emergency department unless and until she is on hospital property. The second sentence is a manifest expression of HHS's intent to exclude from this category those who merely call ahead. It is apparent that HHS put considerable thought into the rather elaborate formulation of the second sentence. While the majority faults the district court for declaring the third sentence superfluous, the majority effectively does the same for the much more pivotal first and second sentences by rendering the entire regulation a nullity, and proceeding to impose its own, contrary view of what "comes to" means. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (Supreme Court" especially unwilling to [treat a statutory term as surplusage] when the term occupies [a] pivotal . . . place in the statutory scheme"). Whatever HHS intended by the third sentence, this sentence should not be read in such a way that it subverts the first two, in which HHS ' s intent is abundantly clear .

As Judge Fernández posits in Arrington, the most plausible reading of the third sentence is that it is simply one scenario -- when the hospital is in "diversionary status" under which the hospital may deny access to an individual in a non-hospital-owned ambulance that calls ahead, and not the only

scenario under which it may deny access. Arrington, 237 F.3d at 1076 (Fernández, J., dissenting). On this reading, the third sentence is not superfluous at all, but is instead fully compatible with the first two.

The fourth sentence explains what happens if the directive in the third sentence is ignored, and in so doing defines "comes to" in a manner fully consistent with the obvious meaning of that term in the first and second sentences. According to the fourth sentence, if the ambulance staff ignores the hospital's denial of access and shows up on hospital property anyway, then the patient has "come to" the emergency department and the hospital must treat her. 42 C.F.R. § 489.24 (b) (4). This sentence plainly evinces HHS's intent that in order to have "come to" the emergency department, the patient must, at the least, be physically on hospital property. This construction of the statute is eminently plausible and demands our deference. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S . 837, 843 (1984).

The Hospital was not required to accept Morales into its emergency department under the governing statute or regulation because she never "came to" the emergency department. Since I would accordingly affirm the district court's summary judgment in favor of the Hospital, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-1951

CAROLINA MORALES, et al.,

Plaintiffs, Appellants,

v.

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA, et al.,

Defendants, Appellees.

JUDGMENT

Entered: April 18, 2008

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court judgment appealed from is reversed and the matter is remanded for further proceedings consistent with opinion issued this day.

By the Court:

/s/ Richard Cushing Donovan, Clerk

Copies: Hon. Francisco A. Besosa, Ms. Frances de Moran, Clerk, United States District Court for the District of Puerto Rico, Mr. Soler-Muñiz, Mr. Pedrero-Lozada & Mr. Gonzalez-Villamil.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-1951

CAROLINA MORALES, et al.,

Plaintiffs, Appellants

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA, et al.,

Defendants, Appellees.

Before
Boudin, Chief Judge,
Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
Lynch, Lopez and Howard, Circuit Judges.

ORDER OF COURT

Entered: May 14, 2008

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case

be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

TORRUELLA, Circuit Judge, Dissenting. I respectfully dissent from the denial of panel rehearing and rehearing en banc for the reasons stated in my dissent from the panel opinion. See Morales v. Sociedad Española Auxilio Mutuo y Beneficencia, No. 07-1951, 2008 WL 1759163 (1st Cir. Apr. 18, 2009) (Torruella, J., dissenting).

By the Court:

/s/ Richard Cushing Donovan, Clerk

Copies: Hon. Francisco A. Besosa, Ms. Frances de Moran, Clerk, United States District Court for the District of Puerto Rico, Mr. Soler-Muñiz, Mr. Pedrero-Lozada & Mr. Gonzalez-Villamil.

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CAROLINA MORALES, et al.,
Plaintiff (s)

CIVIL NO.
06-1039 (FA B)

v.

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA, et al.,
Defendant (s)

ORDER

Because plaintiffs present no new argument for the Court's consideration, their motion Requesting Reconsideration of the Opinion and Order and Judgment (Docket No. 70) is hereby **DENIED**. See National Metal Finishing Co., Inc. v. Barclays American/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990);Berrios-Berrios v. Commonwealth of Puerto Rico, 205 F. Supp.2d 1 (D.P.R. 2002) ("The losing party cannot simply use a motion for reconsideration to repeat arguments previously considered and rejected by the trial court.")

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 3rd day of May, 2007.

S/ Francisco A. Besosa
FRANCISCO A. BESOSA
U.S. DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CAROLINA MORALES, et al.,

Plaintiff (s)

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICIENCIA, et al.,

Defendant (s)

CIVIL NO. 06-1039 (FAB)

OPINION AND ORDER

BESOSA, District Judge.

On May 11, 2006, plaintiffs Carolina Morales ("Morales"), her husband Eduardo Rodriguez ("Rodriguez"), and the conjugal partnership constituted between them (collectively "plaintiffs"), filed an amended complaint against defendants Sociedad Española de Auxilio Mutuo y Beneficencia de Puerto Rico, Hospital Auxilio Mutuo, Inc. (collectively "Auxilio Mutuo"), and Dr. Daniel Diaz-Garcia ("Dr. Diaz-Garcia") alleging violations to the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 4.2 U.S.C. § 1395dd, as well as supplemental state law claims (Docket No. 18). On March 9, 2007, Auxilio Mutuo moved for summary judgment on plaintiffs' claims (Docket Nos. 49-51).

On April 9, 2007, plaintiffs opposed the motion for summary judgment (Docket Nos. 58-60). For the reasons discussed below, the Court **GRANTS** Auxilio Mutuo's motion for summary judgment.

FACTUAL BACKGROUND

On March 12, 2004, while at work, Morales started experiencing acute abdominal pain, vomiting, and profuse internal bleeding. Two days before, Dr. Diaz-Garcia, her gynecologist, had diagnosed her with a non-viable ectopic gestation. Morales' co-workers called 911 and an ambulance was dispatched. Upon arrival, the paramedics stabilized Morales and put her in the ambulance to take her to Auxilio Mutuo, where Dr. Diaz-Garcia keeps his practice. On the way to Auxilio Mutuo, the paramedics contacted the Emergency department to notify her condition. They spoke with the doctor in charge of Auxilio Mutuo's Emergency department, Dr. Salvador Marquez ("Dr. Marquez"). Dr. Marquez interpreted the condition as a voluntarily induced abortion and declined to receive Morales into the Emergency department. He further requested more information from the paramedics, told them he was very busy and that they should call back when they had more information about the abortion. After a few minutes the paramedics again contacted Dr. Marquez, who began asking whether Morales had medical insurance and whether she was a member of Auxilio Mutuo's HMO program. Ultimately, Dr. Marquez abruptly ended the communication with

the paramedics. The paramedics then took Morales to the nearest medical facility.

Dr. Marquez did not state, nor has Auxilio Mutuo alleged, that the hospital was on diversionary status. The ambulance which transported Morales was not owned or operated by the Auxilio Mutuo. The paramedics who transported Morales were not employees of the Auxilio Mutuo at the time of the events of this case.

DISCUSSION

A. Summary Judgment Standard

The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states, in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); See also Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52. (1st Cir. 2000).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." See Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the burden of showing the

absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once a properly supported motion has been presented before the court, the opposing party has the burden of demonstrating that a trial-worthy issue exists that would warrant the court's denial of the motion for summary judgment. For issues where the opposing party bears the ultimate burden of proof, that party cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. See Suarez v. Pueblo Int' l, Inc., 229 F.3d 49 (1st Cir. 2000).

In order for a factual controversy to prevent summary judgment, the contested facts must be "material" and the dispute must be "genuine". "Material" means that a contested fact has the potential to change the outcome of the suit under governing law. The issue is "genuine" when a reasonable jury could return a verdict for the nonmoving party based on the evidence. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is well settled that "[t]he mere existence of a scintilla of evidence" is insufficient to defeat a properly supported motion for summary judgment." Id. at 252. It is therefore necessary that "a party opposing summary judgment must present definite, competent evidence to rebut the motion." Maldonado-Denis v. Castillo-Rodriquez, 23 F.3d 576, 581 (1st Cir. 1994).

In making this assessment, the court "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging in all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). The court may safely ignore "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

B. Auxilio Mutuo's Motion for Summary Judgment

Auxilio Mutuo raises only one argument for summary judgment in its favor, namely, that plaintiffs have failed to establish that Morales did "come to the Emergency Department" of Auxilio Mutuo as required for an action to proceed under EMTALA.

EMTALA was enacted in 1986 as a Congressional response to the concern that uninsured, underinsured, and indigent patients were being "dumped" onto other hospitals by medical facilities unwilling to treat them. See Feighery v. York Hospital, 59 F.Supp.2d 96, 101-102 (D. Me. 1999). The Act created a new cause of action, separate from traditional state medical malpractice. Courts have routinely explained that EMTALA is not to be treated as a federal malpractice statute. See Feighery, 59 F.Supp.2d at 102; Fuentes Ortiz v. Mennonite General Hospital, 106 F.Supp.2d 327, 330 (D.P.R. 2000).

EMTALA has two key provisions: (1) hospitals must provide appropriate screening to individuals who come to its emergency department; and (2) they must provide the services necessary to stabilize the patient's condition before release or transfer. See Alvarez-Pumarejo v. Municipality of San Juan, 972 F. Supp. 86, 87 (D.P.R. 1997) (citing Correa v. Hosp. San Francisco, 69 F.3d 1184, 1190 (1st Cir. 1995)). The Act does not require a hospital to provide a uniform or minimal level of care to every patient seeking emergency care and does not provide a cause of action for misdiagnosis or improper medical treatment. Feighery, 59 F.Supp.2d at 102 (citing Marshall v. East Carroll Parish Hosp., 134 F. 3d 319, 322 (5th Cir.1998)). These areas are traditionally left to state malpractice laws. The purpose of EMTALA is to bridge the gap not covered by state malpractice laws and to ensure that there be "some screening procedure and that it be administered even-handedly." Correa, 69 F. 3d at 1192. "A mere failure to provide medical treatment consistent with generally accepted medical standards is actionable under state tort law." Torres Otero v. Hospital General Menonita, 115 F.Supp.2d 253, 260 (D.P.R. 2000); see also Brooks v. Maryland General Hospital, Inc., 996 F.2d 708, 710 (4th Cir. 1993).

For EMTALA to apply, the individual must have complied with two requirements: the patient (1) must "come" to a hospital with an emergency department, and (2) must make a request or a request must be made on the patient's behalf for

examination or treatment for a medical condition. See 42 U.S.C. § 1395dd (a). In this case, Auxilio Mutuo's argument is that Morales did not arrive at its Emergency Department as required to activate EMTALA's protection. Morales was being transported there and there was communication between the ambulance and the Emergency Department, but because she never did physically arrive, and because neither the ambulance nor the paramedics were under Auxilio Mutuo's supervision or control, it did not owe her any duty under EMTALA.

The language of EMTALA does not define or explain what is intended by the language that a patient "come to the Emergency Department"; whether it requires physical presence at the hospital or if merely being on the way to the hospital is sufficient. Some cases interpreting the statute have required the patient's physical presence in the Emergency department, or at least the Hospital's premises, before EMTALA is activated. See, e.g., Miller v. Medical Center of Southwest Louisiana, 22 F.3d 626, 628-630 (5th Cir. 1994) (Holding that the patient must physically be present at the Emergency department); Johnson v. University of Chicago Hospitals, 982 F.2d 230, 232-233 (7th Cir. 1992) (Holding that patient did not "come" to the hospital's emergency department even if the ambulance contacted hospital-operated telemetry system).

Plaintiffs direct the Court to Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001), where, in a

situation virtually identical to the one here, the court found that EMTALA applies where a patient is being transported in a non-hospital owned ambulance which is in contact with the hospital's Emergency Department. To reach that conclusion, the court, after finding no guidance in EMTALA's legislative history, examined the Department of Health and Human Services' ("DHHS") regulations interpreting EMTALA. Id. at 1071-1073.

The DHHS has interpreted the phrase "comes to the emergency department" to mean that, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment.

42 C.F.R. § 489.24 (b). It seems rather clear, then, after reading the DHHS' interpretation that Morales did not come to Auxilio Mutuo's Emergency Department. The Ninth Circuit Court of Appeals reached the opposite conclusion in Arrington only because it took into consideration the sentence following the above citation, in which the DHHS establishes that "[t]l he hospital may direct the ambulance to another facility if it is in 'diversionary status, ' that is, it does not have the staff or facilities to accept any additional emergency patients. "42 C.F.R. § 489. 24(b).

The Court's reading of the regulation, however, is that while the first sentence is helpful in interpreting the meaning of the phrase "comes to the emergency department" within the context of EMTALA, the second sentence adds nothing to that interpretation. The second sentence is simply a directive from the DHHS to guide hospitals when faced with that specific situation. Moreover, EMTALA does not contain a similar directive instructing hospitals when they can or cannot divert incoming individuals to other hospitals. That the hospital may have breached that administrative directive is not enough to attach liability under EMTALA to Auxilio Mutuo under the facts of this case.

Therefore, because Morales did not "come to the emergency department" at Auxilio Mutuo, EMTALA is not applicable to the facts of this case and her federal EMTALA claims against Auxilio Mutuo must be dismissed

C. Supplemental Jurisdiction

Because no federal claims to ground jurisdiction remain in this case, plaintiffs' supplemental state law claims are dismissed without prejudice pursuant to 28 U.S.C. §1367(c) (3).

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Auxilio Mutuo's motion for summary judgment. Plaintiffs' EMTALA claims are dismissed **with prejudice**. Plaintiffs' supplemental state law claims are dismissed **without prejudice**. Judgment shall enter accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 26th day of April 2007.

S/ Francisco A. Besosa
FRANCISCO A. BESOSA
U.S. DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CAROLINA MORALES, et al.,
Plaintiff (s)

CIVIL NO.
06-1039 (FAB)

v.

SOCIEDAD ESPAÑOLA DE AUXILIO
MUTUO Y BENEFICENCIA, et al.,
Defendant (s)

JUDGMENT

In accordance with the Opinion and Order issued today, the Court hereby enters judgment dismissing plaintiffs' EMTALA claims **WITH PREJUDICE**. Supplemental state law claims are dismissed **WITHOUT PREJUDICE**.

This case is now closed for statistical purposes.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 26th day of April, 2007.

S/ Francisco A. Besosa
FRANCISCO A. BESOSA
U.S. District Judge

113 (2)

Supreme Court, U.S.
FILED
NOV 21 2008
OFFICE OF THE CLERK

No. 08-169

IN THE

Supreme Court of the United States

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA, ET AL.,

Petitioners,

v.

CAROLINA MORALES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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November 2008

QUESTION PRESENTED

The Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd(a), prohibits hospital emergency rooms from refusing treatment to a patient who "comes to" an emergency room, even if the patient lacks health insurance and cannot afford to pay for medical care. In its petition for certiorari, petitioner does not dispute that it is a hospital covered by EMTALA, that respondent Carolina Morales was suffering severe pain and acute blood loss resulting from an ectopic pregnancy, that an ambulance transporting Morales to the hospital requested emergency treatment for her, and that the hospital turned the ambulance away because Morales lacked health insurance.

The question presented is whether the Court should review the First Circuit's decision that EMTALA covers the hospital's refusal to treat Morales even though the ambulance in which she was riding had not yet reached hospital property at the time she was turned away, where the First Circuit's decision follows the only other decision—state or federal—to have considered the issue.

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INTRODUCTION

Two days after being diagnosed with an ectopic pregnancy, respondent Carolina Morales suddenly collapsed at work. Pet. at 3; Pet. App. at 3a. While an ambulance rushed her to the hospital, paramedics called the hospital's emergency-room director to explain Morales's condition and her need for emergency treatment. Pet. App. at 3a-4a. The director asked whether Morales had medical insurance and, when the paramedics did not reassure him that she did, abruptly hung up the phone. *Id.* The ambulance was then forced to take Morales to a different hospital. *Id.*

In its petition for certiorari, Hospital Español Auxilio Mutuo does not dispute that it turned Morales away because she lacked insurance—the precise conduct that Congress designed the Emergency Medical Treatment and Active Labor Act (EMTALA) to prohibit. Pet. App. at 3a-4a. Instead, the hospital argues that Morales was not entitled to protection under EMTALA because, at the time the hospital refused to treat her, she was in an ambulance that had not yet arrived on hospital property. *Id.* The hospital argues that a patient "comes to" an emergency room, as required by EMTALA, only when the patient is *physically present* at the emergency room. Pet. at 5-6. The First Circuit rejected this argument, noting that the hospital's interpretation would create a gaping hole in the statute's coverage that would allow hospitals to evade the law's requirements simply by turning away patients who lack health insurance before they reach the hospital. Pet. App. at 16a-17a.

Contrary to the hospital's argument, the First Circuit's decision does not create a split in the federal courts of appeals. Indeed, the First Circuit reached the same result as the only other case to have considered the issue, *Arrington v. Wong*, 237 F.3d 1066 (9th Cir. 2001).

The hospital's petition asks this Court to overturn both these decisions and decide, for the first time, that EMTALA does not cover an emergency room's refusal to treat a patient, even when the patient is in an ambulance and has requested emergency medical care.

The decisions of the First and Ninth Circuits are supported by EMTALA's language, which covers a patient that "comes" (in the present tense) to an emergency room and not, as the hospital reads it, only a patient that "arrives" at the hospital. 42 U.S.C. § 1395dd(a). Moreover, the courts' reading of the statute is bolstered by the applicable agency regulations, which define "comes to" to include a variety of situations where a patient has not yet physically reached the emergency room, and provide that a hospital may turn away a non-hospital-owned ambulance only when the hospital lacks the resources to take on any more emergency cases. For these reasons, the petition should be denied.

STATEMENT

On March 10, 2004, Morales's obstetrician diagnosed her with an ectopic pregnancy, a form of pregnancy that can cause dangerous and possibly fatal bleeding. Pet. App. at 3a-4a. Two days later, when Morales began suffering severe abdominal pain and vomiting at work, her coworkers called 911. Pet. App. at 3a-4a, 2e-3e. An ambulance arrived and began rushing Morales to petitioner Hospital Español Auxilio Mutuo, where Morales's obstetrician had his private practice. Pet. App. at 3a-4a. On the way to the hospital, the ambulance crew called ahead to the emergency department and notified the department's director, Dr. Salvador Márquez, of Morales's condition and the need for emergency treatment. *Id.* Dr. Márquez told the paramedics that he was very busy and to call back when they had more information. *Id.* When the paramedics called back a few minutes

later, Dr. Márquez asked whether Morales had health insurance and, when the paramedics could not reassure him that she did, hung up the phone. *Id.* The paramedics were then forced to take Morales to a different hospital. *Id.*

Morales and her husband sued the hospital under EMTALA and several state-law causes of action. *Id.* at 4a. Hospitals that participate in Medicaid and Medicare programs agree to be bound by EMTALA, which prohibits its emergency rooms from refusing to treat patients who lack medical insurance or are unable to pay for services. 42 U.S.C. § 1395dd(a). Petitioner hospital is an EMTALA hospital and therefore subject to EMTALA. Pet App. at 3a. Morales's claim specifically invoked subsection (a) of the statute, which provides that, "if any individual . . . comes to the emergency department and a request is made . . . for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination." *Id.* The hospital moved for summary judgment on this claim, arguing that it was free to deny treatment to Morales on the basis of her lack of insurance because Morales had not yet reached hospital property at the time she was refused service and therefore had not "come to" the emergency room for treatment. Pet. App. at 5e. The district court accepted this argument and granted the motion, disagreeing with the Ninth Circuit's decision in *Arrington v. Wong*, 237 F.3d 1066, the only other case to have addressed the issue. Pet. App. at 7e-9e.

On appeal, the only question before the First Circuit was whether the district court erred in holding that Morales had not come to the emergency department under EMTALA. *Id.* at 2a. The First Circuit held that the language "comes to," standing alone, could mean either that a patient is in the process of coming to the hospital or that the patient has already arrived. *Id.* at 9a. Con-

cluding that the statute is ambiguous on this point, the court turned to U.S. Department of Health and Human Services (HHS) regulations interpreting the statute, which apply the "comes to" language to a range of situations where patients have not physically arrived at an emergency room. *Id.* at 10a. Although holding that the regulations did not wholly resolve the ambiguity, the court concluded, like the Ninth Circuit in *Arrington*, that the best reading of the regulatory language was that "an individual can come to the emergency department for EMTALA purposes without physically arriving on the hospital's grounds as long as the individual is en route to the hospital and the emergency department has been notified of her imminent arrival." *Id.* at 2a.

The court found support for its reading of the statute in the "manifest purpose" of EMTALA. *Id.* at 19a. As the court noted, if a hospital could refuse treatment by turning away an ambulance before it reached the emergency room, the hospital could easily evade EMTALA's requirements and freely discriminate against patients who lack insurance. *Id.* As a result, patients "could be bounced around like a ping-pong ball in search of a willing provider," in exactly the way that EMTALA was designed to prevent. *Id.* at 17a.

The court of appeals therefore reversed the district court's decision and remanded for further proceedings. *Id.* at 20a. The court also denied the hospital's petition for rehearing and for rehearing en banc. *Id.* at 1c-2c.

REASONS FOR DENYING THE WRIT

I. The First Circuit's Decision Expressly Agrees with the Only Other Decision to Address the Question Presented.

Contrary to petitioners' assertion, the First Circuit's decision does not conflict with the decision of any other federal court of appeals. Indeed, the only other

court to have considered the issue held, in a "situation virtually identical to the one here," Pet. App. at 7e-8e, that EMTALA *does* cover a patient in an ambulance on its way to a hospital when the ambulance has called ahead to request treatment. *Arrington*, 237 F.3d at 1074.

In *Arrington*, an ambulance had radioed ahead to an emergency room to inform doctors that it was bringing in a patient suffering a heart attack. *Id.* at 1068. Instead of agreeing to treat the patient, the emergency room diverted the ambulance to a more distant hospital. *Id.* As here, the hospital argued that the patient had not "come to" the hospital for purposes of EMTALA. *Id.* The Ninth Circuit rejected the hospital's argument for essentially the same reasons as the First Circuit here. *Id.* at 1070-71. The court held that the statute's plain language could mean "either physical arrival at the emergency room or the act of traveling from the scene of an emergency to or towards the hospital," but that the HHS regulations interpreting the statute specified that a hospital could divert a non-hospital-owned ambulance only if the hospital was in "diversionary status"—meaning that the hospital lacked the resources to take additional emergency cases. *Id.* at 1070-72. Because, as here, the hospital was not in diversionary status, the Ninth Circuit held that EMTALA applied. *Id.* at 1072-73.

Other than the First Circuit below and the Ninth Circuit in *Arrington*, no state or federal court of appeals has addressed the question presented by the hospital here, nor has any other district court published a decision on the subject. The hospital's claim of a conflict among the federal courts of appeals hinges on its reading of decisions from the Fifth and Seventh Circuits. Both the First Circuit below and the Ninth Circuit in *Arrington*, however, concluded that those cases involved very different factual circumstances and presented no conflict. *See* Pet. App. at 17a (explaining that "neither . . . is

on point"); *Arrington*, 237 F.3d at 1073 ("Neither decision . . . is inconsistent with the result we reach here.").

The first case, *Miller v. Medical Center of Southwest Louisiana*, involved a patient who had been admitted at a hospital and whose doctor had called a *second* hospital to request a transfer. 22 F.3d 626, 629 (5th Cir. 1994). Because the patient was already admitted at the first hospital and had "never even beg[u]n the journey" to the second, the First Circuit held that the patient "could not in any sense be said to have come to the second hospital" for purposes of EMTALA. *Id.* at 629 n.5; *see* Pet. App. at 18a (noting that the facts in *Miller* were a "far cry from the case at bar"); *see also Arrington*, 237 F.3d at 1073. Moreover, *Miller* recognized other decisions where courts held that a patient had "come to" an emergency room even when the patient was not physically present there, and explicitly left open the question of whether it would require physical presence under different circumstances. *Id.* at 629 n.5.

Unlike the patient in *Miller*, the patient in the second case, *Johnson v. University of Chicago Hospitals*, was in an ambulance at the time she was allegedly refused service. 982 F.2d 230 (7th Cir. 1992). The ambulance in *Johnson*, however, had never made contact with a hospital emergency room. *Id.* at 232-33. Instead, the ambulance contacted a telemetry system shared by several hospitals, which, because the nearest hospital was in "partial bypass" (the equivalent of "diversionary status"), directed the ambulance elsewhere. *Id.*; *Arrington*, 237 F.3d at 1073. As the First Circuit noted, a telemetry system is distinct from a hospital's emergency room, and, because the ambulance had never requested service from an emergency room, no emergency room had ever denied the patient service. Pet. App. at 18a. Here, in contrast, it was the director of the hospital's emergency department that denied Morales service. *Id.*

at 3a-4a. Moreover, because the hospital in *Johnson* was in the equivalent of diversionary status, both the First and Ninth Circuits agreed that the hospital would not have been required to take any more patients. *See* Pet. App. at 18a; *Arrington*, 237 F.3d at 1073. *Johnson* left open the possibility that it might reach a different result in a case where an ambulance contacted an emergency room directly, or where a telemetry system diverted an ambulance not because a hospital was in diversionary status but as part of a scheme to deny service to the uninsured. 982 F.2d at 233 n.7.

The hospital also argues that the First Circuit's decision is inconsistent with that court's "own previous cases dealing with EMTALA." Pet. at 8. In support of this argument, the hospital cites several cases where the First Circuit described EMTALA as covering patients who "arrive" at or are "visiting" a hospital emergency room. *Id.* at 6-7. That the court would use such language is not surprising, given that the patients in those cases had physically arrived at hospital emergency rooms. *See Correa v. Hosp. San Francisco*, 69 F.3d 1184 (1st Cir. 1995); *Reynolds v. Me. Gen. Health*, 218 F.3d 78 (1st Cir. 2000); *Carmen Guadalupe v. Negrón Agosto*, 299 F.3d 15 (1st Cir. 2001); *Malavé Sastre v. Hosp. Doctor's Ctr., Inc.*, 93 F. Supp. 2d 105 (D.P.R. 2000); *Medero Díaz v. Grupo De Empresas De Salud*, 112 F. Supp. 2d 222 (D.P.R. 2000). As the First Circuit noted below, however, none of these cases "attempt[ed] to define that terminology" or "dealt with any fact pattern remotely resembling the scenario that is alleged here." Pet. App. at 18a-19a.

In any case, even assuming that the intra-circuit split alleged by the hospital were real, it would not be a basis for review by this Court. *See* S. Ct. Rule 10. The First Circuit itself "reject[ed] any suggestion that [its] holding . . . [was] inconsistent with prior decisions of [the] court" and denied the hospital's petition for recon-

sideration en banc. Pet. App. at 18a-19a, 1c-2c. Whether the First Circuit correctly interpreted its own case law was an issue for that court, not for this one.

II. The First Circuit's Decision Was Correct.

Although the hospital makes a token effort to demonstrate a circuit split, its primary argument is that the "case merits review by this Court to correct fundamental legal errors by the Court of Appeals." Pet. at 5. According to the hospital, the First Circuit's decision was wrong because it "ignored the plain language of EMTALA" and HHS's supporting regulations. *Id.* at 4. Contrary to the hospital's contentions, however, the First Circuit devoted its entire opinion to determining the meaning of the statute and regulations, in the process "carefully considering the language of EMTALA, the regulation addressing the pertinent statutory text, and the policies that underlie the statute." Pet. App. at 2a. Like the Ninth Circuit before it, the court concluded that, although the language of both the statute and regulations is somewhat ambiguous, the best reading of that language is that a patient cannot be turned away for lack of insurance while the patient is riding in a non-hospital-owned ambulance en route to an emergency room. *Id.* The First Circuit's conclusion was correct.

A. The Statutory Language Supports the First Circuit's Reading.

The hospital asserts that the plain meaning of "comes to" under EMTALA requires a patient's physical presence at an emergency room. Pet. at 5-6. Other than its bald assertion, however, the hospital provides no explanation or authority supporting its narrow reading of the statutory language. As the First Circuit noted, EMTALA does not define "comes to," and the phrase "has more than one meaning in common parlance." Pet. App. at 9a. Dictionaries defining the word "come" generally

provide "to move toward" or "approach" as the first listed definition of the word, not, as the hospital would read it, "to arrive at." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/come; *see also, e.g.*, Oxford English Dictionary (2d ed. 1989), http://dictionary.oed.com/cgi/entry/50044630 ("[T]he hitherward motion of a voluntary agent . . . . To move towards, approach."); American Heritage Dictionary of the English Language (4th ed. 2000), http://www.bartleby.com/61/10/C0501000.html ("To advance toward the speaker or toward a specified place; approach."). This broader meaning of the word as a *process* of movement, rather than just its end result or arrival, is also consistent with common usage: "California, here I come" does not mean "California, I am here;" Shakespeare's "something wicked this way comes" does not mean that something wicked has arrived; and Mighty Mouse's "here I come to save the day!" means that he is on his way, not that he is already here.[1]

Other than to say that it disagrees with this interpretation, the hospital essentially has no response to the court's analysis of the statute's plain language. Pet. at 8. Instead, the hospital argues that a "reading of the statute as a whole" and consideration of the "Congressional purpose and intent behind it" demonstrate that the statute requires a patient's physical presence at the hospital. Pet. at 8. The hospital is wrong on both counts.

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[1] "To" is "used as a function word to indicate movement or an action or condition suggestive of *movement toward a place* . . . ." Merriam-Webster Online Dictionary, *supra*, http://www.merriam-webster.com/dictionary/to (emphasis added). As the Oxford English Dictionary notes, "to" is "[t]he preposition naturally following come," though it can be replaced with other words "in which the notion to is contained or involved," such as "into, unto, towards," and similar words. Oxford English Dictionary, *supra*.

First, reading the disputed language in the context of the statute as a whole shows only that, when Congress meant to impose a physical presence requirement, it did so with much clearer language. In contrast to the right to emergency screening and treatment at issue in this case, which apply when an "individual . . . comes to a hospital," EMTALA's prohibition on releasing patients before they have been stabilized applies to an "individual *at* a hospital." 42 U.S.C. § 1395dd(c) (emphasis added). The use of the word "at" distinguishes EMTALA's subsection (c) from the otherwise similarly worded subsections (a) and (b), and indicates Congress's understanding that a rule governing *release* of patients, as opposed to rules governing initial screening and treatment, can apply only to patients who are physically present in the emergency room. Congress used even more precise language in subsection (c)(1)(iii), which provides procedures for transferring a patient when there is no physician in the emergency room. There, the statute simply refers to whether the physician is "physically present in the emergency department." 42 U.S.C. § 1395dd(c)(1)(iii).

The problem with the hospital's interpretation is underscored by the fact that, throughout its petition, it substitutes the actual statutory language with language more supportive of its position. Not only does the hospital replace the verb "comes" with "arrives," it changes the statute's use of the present tense "comes" with "has come" and "arrived," words that indicate movement that is complete rather than ongoing. Pet. at 6, 9, 13. *Compare* 42 U.S.C. § 1395dd(c)(2)(C) (referring to cases where a physician "failed to appear" and the "emergency condition for which the individual has presented"); 42 C.F.R. § 489.24 (referring to situations where a patient "has presented at a hospital's dedicated emergency department").

As for the purpose of the statute, given that hospitals are concededly required to accept emergency patients once they have arrived on hospital property, it is difficult to imagine what statutory purpose would support allowing a hospital to turn patients away shortly *before* arrival. The hospital's only argument on this point is its unexplained assertion that the First Circuit's decision "could seriously affect the healthcare industry." Pet. at 5. However, the hospital has not identified even a single case during the seven years since *Arrington* was decided in which an emergency room was subjected to any unwarranted burden as a result of the Ninth Circuit's decision. Indeed, other than *Arrington*, the First Circuit's decision below is the only published decision in which the issue has been raised.

Even if there were otherwise a risk of subjecting hospitals to an undue burden, that risk would be resolved by HHS's implementing regulations. As previously discussed, the regulations provide that a hospital is in "diversionary status," and thus allowed to turn away non-hospital-owned ambulances, when it lacks the staff or facilities to receive new patients. 42 C.F.R. § 489.24. The effect of this rule is that "[a] hospital may not prevent a non-hospital owned ambulance from coming to the hospital unless it has a valid treatment-related reason for doing so." *Arrington*, 237 F.3d at 1072. The First Circuit's reading would therefore only prohibit the hospital from turning away a patient in an ambulance when the hospital has the necessary staff and resources to adequately treat the patient.

On the other hand, as the First Circuit held below, the hospital's interpretation of the statute would be "antithetic to the core policy on which EMTALA is based." Pet. App. at 16a-17a. EMTALA was adopted in response to concerns "that hospital emergency rooms [were] refusing to accept or treat patients with emer-

gency conditions if the patient [did] not have medical insurance." *Correa*, 69 F.3d at 1189 (quoting H.R. Rep. No. 241(I), 99th Cong., 1st Sess. 27 (1986), reprinted in 1986 U.S.C.C.A.N. 42, 605). Adopting the hospital's position would "encourage[] easy evasion of the statutory mandate and open[] a gaping hole in the fabric of the remedial scheme." Pet. App. at 16a-17a; *see also Arrington*, 237 F.3d at 1073-74 (holding that a broader meaning of "comes to" is supported by the "overarching purpose" of the statute to "ensure that patients, particularly the indigent and underinsured, receive adequate emergency medical care") (internal quotations and alterations omitted).

If hospitals could escape EMTALA's reach simply by turning away ambulances before they reach the hospital, uninsured patients could be endlessly directed from hospital to hospital in search of a hospital willing to take them. *See* Pet. App. at 16a-17a. The inevitable result would be injury or death for those who do not reach an agreeable emergency room in time. Moreover, because hospitals would still be obligated to treat a patient in an ambulance once the ambulance has reached hospital property, ambulance crews would have a perverse incentive to take uninsured patients to the emergency room without calling ahead, thus depriving the hospital of an opportunity to prepare for the emergency. Pet. App. at 17a. "Upon arrival, the emergency room would be required to examine and/or treat the individual, but precious time would have been lost." *Id.*

B. Agency Regulations Also Support the First Circuit's Position.

The hospital also argues that the First Circuit failed to defer to HHS regulations interpreting EMTALA's statutory language. Pet. at 9. The First Circuit rejected the hospital's position, however, not because it

refused to defer to the agency's interpretation of the statute, but because it concluded that the agency adopted a position *opposite* to the one the hospital advances. Pet. App. at 16a-17a.

HHS's regulations provide that a person "comes to" an emergency room when the person

> [i]s in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment. *The hospital may direct the ambulance to another facility if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients.*

42 C.F.R. § 489.24 (emphasis added).

In interpreting this provision, the hospital focuses exclusively on the second sentence, which, read in isolation, appears to support its position that a non-hospital-owned ambulance outside hospital property does not trigger the hospital's obligations under EMTALA. The second sentence, however, does not appear in isolation, but is qualified by the immediately following sentence. That sentence provides that a hospital may divert an ambulance "if . . . it does not have the staff or facilities to

accept any additional emergency patients." *Id.* Read together, the second and third sentences of the subsection provide that a hospital may turn away a patient in a non-hospital-owned ambulance if limitations on its resources justify its decision to do so. Pet. App. at 15a-17a; *see also Arrington*, 237 F.3d at 1074. They do not also empower a hospital to turn away a patient simply because the patient lacks health insurance or the ability to pay—the core evil that EMTALA was designed to prevent.

The reason given by the district court for ignoring the qualifying third sentence was that the sentence "adds nothing" to the regulation. Pet. App. at 12a. As the First Circuit recognized, however, to ignore the third sentence would violate the longstanding principle that a statute or regulation should be not be interpreted in way that renders any portion of the statute or regulation meaningless. Pet. App. at 12a-13a. If hospitals could turn away patients in non-hospital-owned ambulances for *any* reason, including lack of health insurance, there would have been no reason for HHS to state that hospitals can turn away patients for the *specific* reason that the hospital is in diversionary status. By reading the third sentence out of the regulation, it is the hospital, not the First Circuit, that ignores the regulation's plain language.

Far from supporting the hospital's view that EMTALA requires a patient's physical presence, HHS's implementing regulations adopt the opposite approach. HHS "has taken an expansive approach to the scope of the phrase 'comes to the emergency department,'" *Arrington*, 237 F.3d at 1066, defining it to encompass situations where a patient, although requesting treatment from an emergency room, stops somewhere short of the emergency room's physical boundaries. Indeed, although HHS's regulations provide several provisions specifying when a person "comes to" an emergency room under

EMTALA, only one of these provisions requires the patient's physical presence. *See* 42 C.F.R. § 489.24 (defining "comes to" to cover situations where a patient has "presented at a hospital's dedicated emergency department").

In addition to physical presence, the regulations provide that a patient "comes to" the emergency room when that person "has presented on hospital property . . . *other than* the dedicated emergency department." *Id.* (emphasis added). This provision extends the requirement of physical presence from the emergency room itself to the entire hospital campus, "including the parking lot, sidewalk, and driveway." *Id.* Moreover, following a case where a hospital refused to treat a teenager who collapsed and bled to death just outside a hospital's property line, the agency further extended the regulations to cover an area extending 250 yards beyond the borders of the hospital's property. 42 C.F.R. § 413.65(a)(2). In that case, HHS "concluded that the statutory intent of EMTALA was to protect those patients who clearly were attempting to reach the [emergency room] and in doing so had come to the hospital's attention." William M. McDonnell, *Will EMTALA Changes Leave Emergency Patients Dying on the Hospital Doorstep?*, 38 J. Health L. 77 (Winter 2005). Finally, the agency applies EMTALA to cases where the patient is not on hospital property at all, but is being brought to the emergency room in a hospital-owned ambulance. 42 C.F.R. § 489.24. The hospital does not dispute the agency's authority to define "comes to" in a way that includes these situations. To the contrary, the hospital stresses the need to defer to the agency's interpretation of the statutory language.

If the plain language of EMTALA allows HHS to regulate patients in areas outside of the emergency room, including hospital-owned ambulances, there is no

reason why it would not allow HHS to regulate patients in non-hospital-owned ambulances as well. The hospital advances no plausible reason why HHS would choose to condition a patient's entitlement to potentially life-saving treatment—and the hospital's entitlement to discriminate against those without the ability to pay—on who happens to own the ambulance responding to a 911 call. The fact that a hospital has not voluntarily accepted responsibility for a patient in a non-hospital-owned ambulance does not explain the distinction, because hospitals are obligated to treat patients who arrive at an emergency room unannounced, as they would have been obligated to treat Morales if the paramedics had disregarded the hospital's instructions and taken her there anyway. Indeed, the whole purpose of EMTALA is to require hospitals to treat patients in situations where they otherwise would have turned them away.

An additional consideration counsels against this Court's involvement here. If the hospital were correct that HHS intended to allow hospitals to turn away non-hospital-owned ambulances because an occupant lacks insurance, the agency could solve that problem simply by clarifying its regulations. Since *Arrington* adopted its reading of the statutory language seven years ago, however, HHS has made no effort to require a different result. In an analogous context, the Supreme Court often takes Congress's failure to amend a statute in the face of the Court's interpretation of the statutory language as an indication that the Court's interpretation is correct. *See Johnson v. Transp. Agency*, 480 U.S. 616, 629-30 n.7 (1987) ("[W]hen Congress has been displeased with [the Supreme Court's] interpretation [of a statute], . . . it has not hesitated to amend the statute to tell [the Court] so."). An agency's failure to respond to a judicial interpretation of its regulations is just as telling. *Cf. Braxton v. United States*, 500 U.S. 344, 348-49 (1991) ("Congress

itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations.").

III. The Lack of Finality of the Third Circuit's Ruling Underscores the Conclusion that Review Should Be Denied.

Finally, the hospital ignores another compelling reason to deny review: the interlocutory nature of the ruling below. Although this Court has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1), it seldom does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases").

The posture of this case is anything but extraordinary. The court of appeals reversed the judgment of the district court on the purely legal ground that the district court erred in concluding that, reading the facts in the light most favorable to Morales, she had not "come to" the hospital. The court remanded the case to the district court for further proceedings, noting that, among other things, the factfinder would have to consider whether the emergency-room director's act of hanging up the phone constituted a denial of service under EM-

TALA. Pet. App. at 5a-6a, 20a. On remand, the court or jury will be free to find for the hospital on any lawful ground, in which case review of the question presented would not be necessary (or appropriate).

This case is an even less appropriate vehicle for immediate, interlocutory review than was *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college that excluded women was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there is no decision regarding liability, let alone the appropriate remedy.

Of course, plaintiffs believe that they will prevail on the merits. If they do, the hospital may appeal from the final decision and, ultimately, petition the Court on the meaning of "comes to" (and any other properly preserved federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was sui generis, here, if petitioner is correct that the meaning of "comes to" arises frequently in the courts of appeals, there will be any number of appropriate future vehicles that would allow this Court to resolve the question. In the meantime, the Court should stay its hand and allow the case to run its course.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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